Appeal No. 04-1804-W **Cir. Ct. No. 03JD000001**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN EX REL. INDIVIDUAL SUBPOENAED TO APPEAR AT WAUKESHA COUNTY JOHN DOE CASE NO. 2003 JD 001,

PETITIONER,

V.

THE HONORABLE J. MAC DAVIS, PRESIDING JOHN DOE MAGISTRATE, AND STATE OF WISCONSIN,

RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Anderson, P.J., Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the petition for a supervisory writ in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Does a John Doe judge have authority, either statutory or inherent, to require a John Doe witness's counsel to take a secrecy oath?

2. Is counsel's refusal to take the oath a basis for disqualifying counsel from representing a witness at the John Doe proceeding?

3. If a John Doe judge has the authority to require counsel to take an oath of secrecy and the authority to disqualify counsel if counsel declines to do so, what is the proper procedure and what are the factors a John Doe judge should consider before disqualifying counsel?

4. How does a witness's WIS. STAT. § 968.26 (2001-02)[1] right to counsel at the John Doe proceeding balance against a John Doe judge's authority to require an oath of secrecy and to disqualify counsel for declining to take the oath?

BACKGROUND

The petition for a supervisory writ alleges that an individual (hereinafter witness) was subpoenaed to appear for examination in a John Doe proceeding. Also present on the date of the witness's scheduled examination was the district attorney, a police officer and a court reporter. The subpoenaed witness appeared with counsel from two different firms. According to the petition, both attorneys have represented the witness for the last two years, apparently in matters related to the John Doe proceeding.

Judge J. Mac Davis, the John Doe judge, instructed everyone at the John Doe proceeding about the secrecy of the proceeding and then required the witness to swear to and sign an oath of secrecy. The witness complied. Judge Davis then asked the witness's counsel to do the same, and counsel refused. Although counsel acknowledged the secrecy of the proceeding and agreed to abide

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

by the secrecy rules and court orders regarding secrecy, they refused to swear an oath of secrecy on the grounds that Judge Davis lacked statutory authority to require them to take an oath. Judge Davis replied that he had inherent authority to do so. Counsel disagreed and argued that their representation of the witness could not be conditioned on the taking of a secrecy oath. The district attorney responded that all other attorneys had taken the oath.

Judge Davis then disqualified counsel from representing the witness in the John Doe proceeding and told the witness to return for examination with an attorney willing to take the oath (or with disqualified counsel, if they would be willing to take the oath). In so acting, Judge Davis stated that a party does not have an unfettered right to choose a lawyer and that the right to choose a lawyer is "fettered by the obligation of the lawyers to comply with various rules and requirements of practicing law in Wisconsin." Judge Davis further reasoned that judges have authority to regulate the conduct and activity in courts and to assure compliance with laws, rules and reasonable operations.

Judge Davis' order disqualifying counsel states that he carefully considered the witness's right to have counsel of his choosing, but concludes:

> [T]hat the need for secrecy and the use of proper procedures to insure secrecy outweighed that right. Though the affirmation of the attorneys that they would comply with the Court's secrecy order provides some guarantees of compliance, it is for the Court to determine proper and sufficient safeguards. The Court's inherent power to supervise judicial proceedings supports such a reasonable and commonplace mode of impressing the importance of secrecy upon all who appear. And the Court did not perceive any unfair or negative impact upon the attorneys or their client.

The witness petitioned this court to prohibit Judge Davis from requiring his counsel to take the secrecy oath.[2] The witness argues that Judge Davis does not have statutory or inherent authority to require such an oath and that the statutory secrecy provisions of a John Doe proceeding, WIS. STAT. § 968.26, sufficiently address the secrecy needs of the proceeding.

In his response to the petition, Judge Davis argues that he has broad discretion to determine the nature and extent of a John Doe proceeding. Judge Davis further argues that he has statutory authority pursuant to WIS. STAT. § 968.26 and inherent authority by virtue of his judicial office to conduct a John Doe proceeding in secrecy, and to take steps to insure the effectiveness of the proceeding and its secrecy. Judge Davis contends that this authority provides a reasonable basis to require an oath of secrecy. Finally, Judge Davis claims that he has inherent authority to disqualify counsel for a witness if counsel refuses to take an oath of secrecy.

We stayed the John Doe appearance of the witness pending resolution of this writ. We now certify this matter to the Wisconsin Supreme Court.[3]

---

[2] The court of appeals has jurisdiction to entertain a petition for a supervisory writ against a John Doe judge. ***State ex rel. Unnamed Person No. 1 v. State***, 2003 WI 30, ¶48, 260 Wis. 2d 653, 660 N.W.2d 260.

[3] The petitioner moved the court to seal the record in this court. We have ordered a response from the State to the request to seal the record, and we sealed the record pending a determination on this question. Additionally, a reporter has asked to see the petition and an order of this court. The reporter's request has been held in abeyance pending a determination on the question of whether the record will be sealed. Although we do not certify the question of whether the record should be sealed, if the supreme court grants certification, the supreme court might also determine this question as well.

DISCUSSION

Does a John Doe judge have authority, either statutory or inherent, to require the witness's counsel to take a secrecy oath?

"The John Doe judge is a judicial officer who serves an essentially judicial function." ***State v. Washington***, 83 Wis. 2d 808, 823, 266 N.W.2d 597 (1978). The judge has "the dual obligation to enable the prosecution to use the tools of a John Doe proceeding to facilitate the investigation of purported criminal activity and to insure that the witness is treated fairly and protected from oppressive tactics." ***Id.*** at 836. The John Doe judge must "ensure that the considerable powers at his or her disposal are at all times exercised with due regard for the rights of witnesses, the public, and those whose activities may be subject to investigation." ***State ex rel. Unnamed Person No. 1 v. State***, 2003 WI 30, ¶52, 260 Wis. 2d 653, 660 N.W.2d 260 (quoting ***State v. O'Connor***, 77 Wis. 2d 261, 284, 252 N.W.2d 671 (1977)). The John Doe judge "has broad discretion to determine the nature and extent of John Doe proceedings" and has "final responsibility for the proper conduct of John Doe proceedings." ***Unnamed Person No. 1***, 260 Wis. 2d 653, ¶52. The John Doe judge must ensure procedural fairness. ***Id.***, ¶55.

A John Doe judge does not enjoy the statutory powers of a court. ***Id.***, ¶54 n.15. However, a John Doe judge may "exercise the authority inherent in his or her judicial office," and the judge may "issue subpoenas, examine witnesses, adjourn the proceedings, take possession of subpoenaed records, adjudicate probable cause, and issue and seal warrants." ***Id.***, ¶54.

WISCONSIN STAT. § 968.26 authorizes the John Doe judge to impose secrecy on the John Doe proceeding, and witnesses and others present may be

admonished, as set forth in WIS JI—CRIMINAL SM-12 (1999), not to disclose information from the secret proceeding. ***O'Connor***, 77 Wis. 2d at 278-79.

The relevant portion of WIS. STAT. § 968.26 appears in bold and authorizes the John Doe judge to order the proceeding secret:

> If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. **The extent to which the judge may proceed in the examination is within the judge's discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge.**

WISCONSIN JI—CRIMINAL SM-12 covers John Doe proceedings and provides that the John Doe judge may administer an oath and instruct the witness on secrecy. SM-12 further contemplates that the judge will issue a secrecy order and provide a copy of the order to the witness. If the witness is represented, SM-12 contemplates that the judge will advise counsel of the secrecy restrictions and the limitations on counsel's participation in the hearing as set forth in WIS. STAT. § 968.26.[4] Counsel may be ordered to maintain the secrecy of the proceeding and to acknowledge receipt of the secrecy order. SM-12 does not discuss having counsel also swear an oath of secrecy.

[4] Pursuant to WIS. STAT. § 968.26, counsel is not permitted to examine the witness, cross-examine other witnesses or argue before the judge.

The supreme court has construed WIS. STAT. § 968.26 with an eye toward giving a John Doe judge the powers he or she needs to discharge the obligation to investigate. For example, in ***State v. Cummings***, 199 Wis. 2d 721, 546 N.W.2d 406 (1996), the court discussed the John Doe judge's ability to issue a search warrant even though such is not an enumerated power under § 968.26. The court reasoned that because the ability to issue a search warrant is conferred upon all judges by WIS. STAT. § 968.12, the John Doe statute need not specifically mention the issuance of search warrants for the John Doe judge to have such power. ***Cummings***, 199 Wis. 2d at 734-35. Additionally, the court reasoned, "statutes should be interpreted in a manner which supports their underlying purpose." ***Id.*** at 735 (quoted source omitted).

> This court has repeatedly held that the John Doe proceeding was designed as an investigatory tool to be used as an "inquest for the discovery of crime." Denying John Doe judges the ability to issue search warrants would seriously reduce the investigatory power of the John Doe proceeding.

Id. (citation omitted). The ***Cummings*** court further reasoned that "[t]he ability to seal a search warrant is exactly that type of power which a John Doe judge needs to fulfill" the judge's jurisdictional mandate under § 968.26 to ascertain whether a crime has been committed and by whom and to investigate the same. ***Cummings***, 199 Wis. 2d at 736-37. The court ruled that it would make little sense to deprive the John Doe judge of the power to seal a search warrant when the proceedings themselves are secret pursuant to § 968.26. ***Cummings***, 199 Wis. 2d at 737. Finally, the court noted that the John Doe judge's powers are not limited to those enumerated in § 968.26. ***Cummings***, 199 Wis. 2d at 738.

In the context of initiating a John Doe proceeding, the court in ***Wisconsin Family Counseling Services, Inc. v. State***, 95 Wis. 2d 670,

291 N.W.2d 631 (Ct. App. 1980), stated that a John Doe judge may exercise his or her authority to administer an oath under WIS. STAT. § 887.01(1).[5] ***Wisconsin Family Counseling Servs.***, 95 Wis. 2d at 675. The court further explained:

> The authority to issue a subpoena and administer an oath is not dependent upon the judge discharging the function of a court. He is a judge at chambers with the powers inherent in his judicial office but not dependent upon the jurisdiction necessary if he functions as a court. To the contrary, he functions as a one-man grand jury—an investigatory body that antedates the constitutions of the United States and state of Wisconsin where its investigatory functions, ancillary to its historical authority to return criminal indictments, is preserved. Wis. Const. art. I, § 7; U.S. Const. amend. V.

Wisconsin Family Counseling Servs., 95 Wis. 2d at 675-76 (footnote omitted). Notwithstanding the pronouncement in this case, it is unclear if § 887.01(1) is sufficient authority for requiring counsel to take a secrecy oath in light of other concerns expressed in this certification.

Because there are multiple considerations at play, we think it is for the supreme court to decide if the John Doe judge's power under WIS. STAT. § 968.26 to declare John Doe proceedings secret includes the power to require counsel to take a secrecy oath. In addition, the supreme court might also consider whether the John Doe judge has inherent judicial authority to require counsel to take a secrecy oath if the judge perceives that an oath is necessary to discharge the

[5] The pertinent portion of WIS. STAT. § 887.01(1) states:

> An oath or affidavit required or authorized by law, except oaths to jurors and witnesses on a trial and such other oaths as are required by law to be taken before particular officers, may be taken before any judge, court commissioner ....

obligation to keep the John Doe proceeding secret, and whether WIS. STAT. § 887.01(1) is authority for taking a secrecy oath from counsel.[6]

We note that the John Doe statute already provides for secrecy of the proceedings and WIS JI—CRIMINAL SM-12 contemplates that counsel will acknowledge receipt of the secrecy order and operate under the secrecy order. The supreme court might consider whether the secrecy oath to counsel is redundant.

The supreme court also might consider whether counsel's status as an "officer of the court" factors into the secrecy oath question.

> An attorney at law is an officer of the court. The nature of his obligations is both public and private. His public duty consists in his obligation to aid the administration of justice; his private duty, to faithfully, honestly, and conscientiously represent the interests of his client. In every case that comes to him in his professional capacity he must determine wherein lies his obligations to the public and his obligations to his client, and to discharge this duty properly requires the exercise of a keen discrimination; and

[6] The parties' submissions to this court in support of and in opposition to the petition for a supervisory writ discuss ***In re Grand Jury Subpoenas***, 387 So. 2d 1140, 1143 (La. 1980). In that case, the Louisiana Supreme Court held that a juvenile subpoenaed before a grand jury may have counsel present, but counsel must take an oath of secrecy. The majority opinion is based on Louisiana state statutes governing grand jury proceedings.

In a concurring opinion, a justice objected to requiring counsel to take a secrecy oath because the applicable grand jury statute rendered the proceedings secret. The justice stated:

> Stringent standards of professional conduct govern lawyers; their obligations sometimes seem to conflict. Because of the discretionary powers they are expected to exercise, they occupy a professional status in society. We should not unnecessarily confuse the exercise of that discretion with the threat of contempt proceedings for the violation of an oath of secrecy. The lawyer must be as free as possible, under the law and standards of professional conduct, to advise and protect his young clients.

Id.

> wherever the duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter.

Strid v. Converse, 111 Wis. 2d 418, 428, 331 N.W.2d 350 (1983) (quoted source omitted).

Counsel's status as an officer of the court might lead the supreme court to consider whether the requirement that counsel take a secrecy oath should lead to counsel's disqualification. In this context, it also seems reasonable to consider whether the witness's right to counsel at the John Doe proceeding, WIS. STAT. § 968.26, should be balanced against the John Doe judge's authority to require counsel to take a secrecy oath.

Is counsel's refusal to take the oath a basis for disqualifying counsel from representing a witness?

Unnamed Person No. 1, 260 Wis. 2d 653, ¶2, holds that a John Doe judge has authority to disqualify counsel for a conflict of interest. The court recognized that being able to disqualify counsel is linked to the John Doe judge's ability to carry out the judge's responsibilities with respect to the proper conduct of a John Doe proceeding. ***Id.***, ¶55. The grant of jurisdiction to John Doe judges "includes those powers necessary to fulfill the jurisdictional mandate." ***Id.*** (quoted source omitted).

If the John Doe judge has authority to require counsel to take a secrecy oath, it probably follows that the John Doe judge has authority to disqualify counsel from representing a witness if counsel declines to take the oath. But, the supreme court might consider whether the disqualification of counsel under such circumstances clashes in some impermissible way with the witness's right to counsel at the John Doe proceeding.

If the John Doe judge has the authority to require counsel to swear to and sign an oath of secrecy and to disqualify counsel if counsel declines to do so, what is the proper procedure and what are the factors the John Doe judge should consider before disqualifying counsel?

The Wisconsin Supreme Court has inherent authority to regulate the bench and members of the bar. ***Flynn v. DOA***, 216 Wis. 2d 521, 549-50, 576 N.W.2d 245 (1998). The supreme court has authority "to define and regulate the practice of law." ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 202-03, 562 N.W.2d 401 (1997).

Deciding whether to disqualify counsel is a discretionary decision of the John Doe judge. ***Unnamed Person No. 1***, 260 Wis. 2d 653, ¶58. We think it is for the supreme court to establish the factors to be considered and the procedure to be employed in disqualifying counsel for a witness in a John Doe proceeding for declining to take a secrecy oath.

How does the witness's WIS. STAT. § 968.26 right to counsel at the John Doe proceeding balance against the judge's authority to require an oath of secrecy which has resulted in the disqualification of the witness's counsel?

The supreme court in ***Unnamed Person No. 1***, 260 Wis. 2d 653, ¶51, recognized that "witnesses and persons under investigation have substantial rights and due process protections" in the John Doe proceeding. WISCONSIN STAT. § 968.26 permits the witness to have counsel present during questioning. ***Unnamed Person No. 1***, 260 Wis. 2d 653, ¶51; ***State v. Doe***, 78 Wis. 2d 161, 165, 254 N.W.2d 210 (1977).

When a John Doe judge exercises his or her authority, such exercise must take into consideration other rights intrinsic to the John Doe proceeding. ***Cummings***, 199 Wis. 2d at 738. Here, Judge Davis' disqualification of the

witness's counsel has arguably collided with the witness's right to have counsel at the John Doe proceeding. Because the John Doe proceeding likely involves the investigation of a criminal matter, it is prudent to consider the source and strength of the John Doe witness's right to counsel.

A John Doe witness's right to counsel springs from the witness's right not to incriminate himself or herself. ***Ryan v. State***, 79 Wis. 2d 83, 94-95, 255 N.W.2d 910 (1977). In other words, "[a]s a measure of due process, a witness is entitled to some protection against self-incrimination. The protection afforded is the privilege against self-incrimination itself. The statute gives any John Doe witness the right to have counsel present to advise him so that he can intelligently assert his self-incrimination right." ***Id.*** at 95.[7] A John Doe judge cannot compel self-incriminating testimony. ***State ex rel. Jackson v. Coffey***, 18 Wis. 2d 529, 533, 118 N.W.2d 939 (1963).

The supreme court might question whether Judge Davis adequately balanced the witness's right to have counsel present against the need for counsel to take a secrecy oath. In Judge Davis' view, a witness's right to choose counsel must give way to the judge's right to control the proceeding. Complicating this analysis is the fact that the witness's counsel did not inform Judge Davis that they had a long-standing relationship with the witness in matters related to the John Doe proceeding; counsel merely argued that Judge Davis did not have authority to

[7] Therefore, the John Doe witness's right to counsel springs more from the Fifth Amendment (which protects a person's right, in a criminal case, not to incriminate himself or herself), than from the Sixth Amendment right to counsel (which attaches at every stage of the criminal prosecution). ***State v. Dagnall***, 2000 WI 82, ¶¶31-33, 236 Wis. 2d 339, 612 N.W.2d 680.

require them to take a secrecy oath or to condition their representation upon the taking of the oath.

Because counsel did not object on the basis of the long-standing relationship and the impact on the witness of the disqualification, it may be difficult to fault Judge Davis for not considering the nature of the attorney-client relationship in his decision to disqualify counsel. However, the supreme court might consider whether Judge Davis had a plain legal duty to inquire *sua sponte* regarding the nature of the attorney-client relationship before disqualifying counsel.[8]

A John Doe judge misuses his or her discretion when the judge exceeds his or her authority. ***Custodian of Records v. State***, 2004 WI 65, ¶10, 272 Wis. 2d 208, 680 N.W.2d 792. "If the facts show that the judge has … otherwise improperly conducted the proceeding and intends to persist, he or she can be restrained by writ of prohibition for abuse of discretion." ***Washington***, 83 Wis. 2d at 824. If Judge Davis had authority to require the oath, did he misuse his discretion in disqualifying counsel without considering the harm to the witness of losing his counsel?

CONCLUSION

This writ presents the opportunity to clarify the authority of a John Doe judge in the area of the secrecy provisions of WIS. STAT. § 968.26 and the intersection of that authority with a John Doe witness's right to counsel.

[8] Another potentially relevant consideration is the district attorney's statement at the John Doe hearing that the witness plans to "invok[e] on all aspects," i.e., the witness will decline to answer questions on self-incrimination grounds.

Additionally, this writ presents an opportunity for the supreme court to inform the bench and bar of the procedure to be used and the factors to be considered in disqualifying counsel for a John Doe witness for declining to take a secrecy oath. As the court charged with regulating the practice of law and the conduct of judges, the supreme court is in the best position to determine for the State of Wisconsin the questions posed by this certification.